

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD¹
REGION 20

BONNIE S. INGRAM d/b/a

METRO COURIERS²

Employer

and

Case 20-RC-18042

CHAUFFEURS, TEAMSTERS, AND
HELPERS LOCAL UNION No. 150

Petitioner

DECISION AND DIRECTION OF ELECTION

Bonnie S. Ingram d/b/a Metro Couriers (herein called Metro or the Employer) has a contract with DHL Worldwide Express, Inc. (herein called DHL) to provide parcel delivery and pickup services from DHL's Fairfield, California facility. The Petitioner, Chauffeurs, Teamsters and Helpers Local Union No. 150, filed a petition with the National Labor Relations Board (the Board) under Section 9(c) of the National Labor Relations Act (the Act) seeking to represent a unit comprised of all Metro's package car drivers, excluding all other employees, supervisors and guards as defined by the Act.³

² The Employer's name has been amended in accord with the parties' stipulation. The petition initially named DHL Worldwide Express, Inc.(DHL) as a joint employer. Petitioner subsequently withdrew DHL from the petition.

¹ Hereafter also called the Board.

³ At the hearing, Petitioner indicated that it also seeks to include the "pm sorters" and "airport drivers" in the unit and seeks to exclude driver Dave Davis and Manager Maury Selvin from the unit.

A hearing officer of the Board held a hearing in this matter on July 14 and 15 and August 8 and 9, 2005. Testifying at the hearing were Metro's Owner, President and CEO Bonnie Ingram, Manager Maury Selvin, former driver Abdul Rasheed, and drivers Dave Davis, Nick Gong, Karmen Thompson, Karen Snedeker, and Alphonso Medina. The parties subsequently filed briefs with the undersigned. The main issue presented in this case is whether Metro's package drivers are independent contractors and thus are not employees as defined in Section 2(3) of the Act.⁴ Metro asserts that the package drivers are independent contractors, while the Petitioner contends that they are employees entitled to the benefits and protections of the Act.

I have considered the evidence and the arguments presented by the parties on this issue. As discussed below, based upon the evidence and relevant law, I have concluded that Metro's package drivers and its "overflow courier" are "employees" as defined in Section 2(3) of the Act. I also find that the airport drivers and the "p.m. sorters" are "employees" as defined in Section 2(3) of the Act and that they share a sufficient community of interest with the package drivers to be included in the bargaining unit. I have concluded that Manager Maury Selvin is not a statutory supervisor under Section 2(11) of the Act and he shall be included in the bargaining unit. Finally, I have concluded that driver Dave Davis is an independent contractor and he shall be excluded from the bargaining unit.

⁴ Although the phrase is not used by Metro, I will use "package driver" throughout this decision to refer to the drivers who are assigned a regular route and whose function is to deliver packages at DHL's pre-set delivery times and who are also responsible for picking up packages throughout the day. As more fully described below, Metro also uses the services of: two drivers to deliver packages to and from the Sacramento Airport and the Fairfield facility; one "overflow courier"; approximately ten "p.m. sorters" to sort packages in the evening at the Fairfield facility; and one driver (Dave Davis) whose sole assignment is to service regular pickups from three large clients.

I. Overview of Employer's Operations

Metro is a sole proprietorship owned by Bonnie S. Ingram. Ingram owns and operates other businesses in the States of Washington and Idaho. Ingram formed Metro in about April 2003 to provide delivery services to banks in the San Francisco Bay area. As described more fully below, Metro was awarded a contract by DHL to provide package delivery services from DHL's Fairfield, California facility in February 2005. Metro's DHL contract and operation out of the Fairfield facility are completely separate from the banking services provided in the Bay area. The only operation involved in this decision is the DHL operation out of the Fairfield facility.

Metro is one of two contractors providing DHL delivery and pickup services out of DHL's Fairfield facility. Metro and the other DHL contractor working out of that facility, DNM Delivery Solutions, Inc., cover two separate geographic areas.⁵ Metro has no business in Fairfield, California, other than the pickup and delivery services it provides to DHL.

Metro and DNM both contracted with DHL to provide service at the Fairfield facility beginning in early February 2005. Prior to that time, a single contractor, H.B. Anderson, provided all of DHL's pickup and delivery services at the Fairfield facility.

As of the time of the hearing, approximately fourteen package drivers picked up and delivered DHL packages to and from customers for Metro. In addition, Metro employs two drivers to deliver containers of packages from the Sacramento airport to the Fairfield facility first thing in the morning and to deliver containers of packages from the Fairfield facility to the

⁵ The Petitioner also filed a petition to represent DNM's drivers in Case 20-RC-18041. The parties in that case also disagreed as to whether DNM's drivers are "employees" or "independent contractors" and a separate hearing was held in that matter. A Decision and Direction of Election issued in Case 20-RC-18041 on October 21, 2005, finding that DNM's drivers are employees under Section 2(3) of the Act.

airport in the evening. Finally, Metro employs ten people to perform the “pm sort.” The work involved in the pm sort is detailed below. Metro also employs a manager, Maury Selvin. DHL employs a station manager, Scott Rivers, at the Fairfield facility.

The Fairfield facility operates Monday through Saturday. The facility is essentially a large warehouse with a conveyor belt running through the center. Metro has slots for the package drivers’ vans on one side of the conveyor belt and DNM has slots for its drivers’ vans on the other side of the belt. Packages begin to arrive at the Fairfield facility from the airport at about 5:30 a.m. DHL has determined that the conveyor belt will begin running at 7:00 a.m. in the morning. Each morning, a couple of the package drivers unload the packages from the airport crates and place them on the conveyor belt; the drivers refer to this work as “throwing freight.” The drivers rotate the task of throwing freight. The rest of the package drivers stand between their van and the conveyor belt and watch for packages that are addressed to customers on their route. As they spot packages on their route, the drivers pick the package off the belt, scan it into their scanner, and then either place it on the ground or load it in their van; the drivers refer to the process of removing packages from the belt as “picking freight.” The package drivers pick freight until about 8:30 a.m. After all of their packages have been retrieved from the belt, the drivers load their vans and download their scanner. Metro does not require the package drivers to load their vans in a particular way.⁶ Pursuant to its contract with DHL, Metro selects two vans to audit each morning. As part of the audit, Manager Selvin spot checks to ensure that

⁶Metro, based on information from DHL, has suggested certain methods of loading the vans.

the drivers' packages have been scanned properly.⁷ Package drivers then leave the facility to begin their routes.

Metro does not tell drivers the order in which they should make their deliveries or pickups. The contract between DHL and Metro requires that deliveries be made to customers by set times (10:30 a.m., noon, 3:00 p.m., or 5:00 p.m.) depending upon the shipping priority for the packages. Package drivers make pickups throughout the day. Some pickups are regularly scheduled and others are called in by customers that day. If the pickup is called in that day, DHL or Metro's dispatcher will send a message to the package driver on his scanner.⁸ When the driver is notified of a pickup, he is given a window period during which the pickup must be made. DHL establishes cut off times after which pickups will not be made. The package drivers scan their deliveries and pickups as they are made to record the package's status and the time.

After the package drivers' last pickups, they return to the Fairfield facility. When they return at the end of the day, the package drivers unload their pickups, sign in to show that they have arrived at the station, scan any packages that were undeliverable, place their scanners in a cradle to download data to DHL's database, and fill out the paperwork associated with the deliveries and pickups made that day. Drivers are told to return to the facility by 4:30 p.m. because their packages must be sorted and then loaded onto the 4:30 p.m. van, the 4:45 p.m. chase van, or the 5:10 p.m. truck that go to the Sacramento Airport.

In addition to its contract with DHL to provide the services described above, Metro has also contracted with DHL to perform the "pm sort" and to transport both Metro's and DNM's

⁷DHL also occasionally audits vans to make sure that drivers are carrying required DHL supplies.

⁸One of the driver witnesses estimated that a dispatcher contacted him four to five times a day with messages regarding pickups or with other delivery information.

freight between the Fairfield facility and the Sacramento Airport in the early morning and at 4:30 and 4:45 p.m.⁹ After the package drivers return to the Fairfield facility at the end of the day, the packages that they have picked up are placed on the conveyor belt and then are sorted and placed in the appropriate airport containers. Ten drivers, a mix of Metro and DNM drivers, contract with Metro to perform this extra work. The drivers are paid a flat rate of \$16/day for the pm sort and it takes approximately 30 minutes to an hour to perform.

The same routine occurs on Saturdays, but because the load is much lighter, only three package drivers are required to work for Metro and it usually takes about half a day to make the deliveries and pickups. The package drivers volunteer to do Saturday work by notifying Manager Selvin that they are interested. Metro informed the package drivers that if there were not enough volunteers for Saturday work, the work would be rotated among the package drivers. Metro pays the Saturday drivers a flat rate of \$93 or \$100 (according to Ingram, the Vacaville route has a higher mileage and justifies a higher rate). A couple of the Saturday drivers are employed as drivers for DNM Monday through Friday.

II. Status of the Package Drivers A.

Indicia of Independent Contractor Status versus Employee Status

1. Hiring the Drivers. At the time of the hearing, approximately fourteen package drivers worked for the Employer, including Nick Gong, Karmen Thompson, Alfonso Medina and Karen Snedeker, who each testified at the hearing. Some of the drivers, including Gong and Thompson, previously performed services for H.B. Anderson and were retained by the Employer

⁹ There is also a 5:00 p.m. truck that runs from the Fairfield facility to the Airport. The Employer has not contracted with DHL to provide the 5:00 airport run – this work is performed by an entity named Maan Trucking. The driver for Maan Trucking is not at issue in this case.

when it assumed the DHL contract. It appears that the former H.B. Anderson drivers kept the same routes that they drove for Anderson.

Employer President and CEO Ingram testified that after she was awarded the DHL contract at Fairfield, she met with all of the Anderson drivers with routes in the geographic area awarded to Metro and she let them know that they had the opportunity to work with Metro as a contractor. Ingram, or an agent, then met with each driver in a one-on-one meeting to present a “model” flat rate based on the driver’s route. According to Ingram, this model rate was based on such factors as Department of Labor wages for similar work in that market, rough mileage for each route, and the equivalent of 401(k) contributions, workmen’s compensation insurance and taxes. The Employer informed the drivers that it would reevaluate the rates about six months after it had been operating to see if any adjustments were warranted. According to Ingram, some of the drivers made a counter offer regarding the rate that they were seeking for their route. Ingram reached agreement with all but one of the former Anderson drivers. The record does not reflect that the package drivers negotiated much over the rate proposed by Ingram. The drivers’ daily rates vary slightly: the nine package drivers who drive cargo vans ended up with flat rates varying between \$170 and \$184; the three package drivers who drive box trucks have flat rates varying between \$190 and \$199; and the two “overflow” or part-time drivers have flat rates of \$160 and \$120, respectively. After meeting with each driver, the daily flat rate was then incorporated in a document titled “Independent Contractor Agreement” (IC Agreement). No evidence was introduced that the package drivers can negotiate any of the other terms of IC Agreement; in fact, each driver signed an IC Agreement without making any changes to the language of the document.

2. The Independent Contractor Agreement.

The numerous IC Agreements in the record are identical, with the exception of the route assignment and the daily rate paid to the driver.¹⁰ Each IC Agreement contains a clause stating that the individual contracting with Metro understands that he/she “is completing this information in order to contract my services as a self-employed independent contractor and not as the employee of any company.” Each individual signing the IC Agreement certifies that he is engaged in the business of public transportation, is licensed to do such business in the State of California and is willing and able to render the pickup and delivery services required by the Employer. Under the IC Agreement, the Employer does not guarantee the package drivers any amount of work and the drivers retain “the right to provide services for other carriers or customers.” Each IC Agreement is effective for an indefinite period.

The IC Agreement provides for the following: that the package driver is responsible to complete the route listed in his/her Agreement and assumes all liability for completing the route, including but not limited to providing backup; that the package driver must maintain a specified amount of automobile insurance; that the package driver must comply with and/or obtain applicable licenses, including a driver license and, to the extent required by law, a business license; that the driver carry a communication device; and that DHL’s logo be displayed on any vehicles used to complete the contract route and that the driver wear a DHL uniform. The IC Agreement contains a non-competition clause barring package drivers from soliciting work from the Employer’s customers and a non-disclosure clause prohibiting drivers from sharing confidential trade secrets.

¹⁰ In addition to the package drivers, the record contains IC Agreements for Manager Selvin, airport drivers Tutt and Pope, Driver Dave Davis and for those individuals who perform the pm sort.

Each IC Agreement outlines the driver's responsibility for customer service including requirements for completing, maintaining and transmitting shipping documents, exercising care to avoid damage to packages, and imposing penalties for service failures (missed delivery deadlines). In addition, the driver may be liable to the Employer for any loss or damage to shipments while they are in the possession of the driver. The IC Agreement specifies that the Employer does not have requirements regarding "the specifics of how [the driver] conducts the assignment" but goes on to state the Employer will issue "reasonable and lawful instructions regarding the results to be accomplished by [the driver] and failure to accomplish such results shall be considered a breach of this Agreement by [the driver]."

Other provisions of the IC Agreement also provide that certain actions or inactions constitute a breach of the Agreement that may result in its termination including the driver's failure to obtain and maintain insurance, driver negligence resulting in a loss of revenue to the Employer, and a driver's breach of the non-competition clause. In addition, a complete or significant reduction in the services needed by the Employer's customers is ground for termination of the IC Agreement.

According to Ingram, Metro had terminated the ICs of three package drivers as of the time of the hearing in this matter. Two ICs were terminated because the drivers provided false information on their applications, which came to light during their background check, and one driver's IC was terminated because "he could not grasp the service commitments that must be made to accommodate DHL."

3. The Drivers' Trucks and Equipment. Of the fourteen package drivers working for Metro at the time of the hearing: five of the drivers owned their cargo vans; one driver operated a cargo van that was the subject of a short-term lease between Metro and Enterprise; five drivers

operated cargo vans that were the subject of long-term leases between Metro and Enterprise; and one driver operated a van under a purchase agreement with Metro. In addition, two drivers who perform primarily “overflow” work drive their personal vehicles without the DHL logo. According to Metro, it arranged the long-term leases and purchase agreement for drivers who could not have afforded the down payment for a vehicle on their own. Metro made the initial down payment on these vehicles and then passes the monthly lease costs along to the driver. The lease payments made to Metro, and in turn to Enterprise, cover the cost of preventative maintenance and commercial automobile insurance on the vehicles. The package drivers pay for their own fuel.

The evidence establishes that Metro does not permit the leased vans to be taken home each evening because the lease rate between Metro and Enterprise is based on a set number of miles each year, which Metro assumes it will reach through the drivers’ daily route activity. Presumably then, the drivers who lease vans from Metro cannot use those vans for other businesses because such use would also increase the mileage. Metro does not have a rule prohibiting drivers from taking the vans that they own home, even if the van has a DHL logo.

Although the IC Agreement does not address the issue, in practice there is a requirement that the vehicles used by the drivers to fulfill their delivery obligations must meet the specifications of certain makes and models, be painted with DHL’s colors, and bear DHL’s logo. This practice stems from the Cartage Agreement between Metro and DHL that incorporates DHL’s Trademark Usage and Display Standards and Specifications (Trademark Usage Guidelines). Further, the Trademark Usage Guidelines require Metro to ensure that: the drivers’ vehicles are “maintained to project a professional and businesslike image through a program of regular cleaning, painting and repair;” the vehicles display lettering to show that the vehicle is

“Operated By” Metro, and, “no extraneous stickers, decals, or advertisements” be allowed on any vehicle bearing the DHL logo. Finally, the Cartage Agreement prohibits any vehicle with the DHL logo on it from being used for any purpose other than DHL deliveries.¹¹

Metro is required by the Cartage Agreement to have its drivers use DHL scanners/radios. Metro pays a rental fee to DHL for these devices and Metro, in turn, charges the drivers a rental fee of \$14/week for their use of the scanners. The drivers use the scanners to keep track of their packages and to download the information to DHL’s database. In addition, a message will pop up on the scanner if the driver has a pickup or if there is another communication from the dispatcher.

Metro also requires the package drivers to obtain and carry a cell phone. The drivers must be available by cell phone during the work day, even if they are not making pickups or deliveries at the time. Drivers are responsible for obtaining and paying for their own cell phones.

4. Package Drivers' Schedules and Routes. Package drivers are expected to be at the facility by 6:30 a.m. and the conveyor belt begins running at 7:00 a.m. Manager Selvin testified that drivers do not always arrive by 6:30 a.m. and that they are not disciplined if they are late. Metro’s CEO and president, however, admitted that she has told the package drivers that they had to be at the Fairfield facility at 7:00 a.m. Ingram explained that while one driver routinely comes in between 7:00 and 7:30 a.m. without adverse consequence due to child care arrangements, the package drivers are required to be at the Fairfield facility in time to get their vehicle loaded and to depart the station in a timely manner. Whether or not they were

¹¹ See Sections 3.5.1 and 3.14 of the Cartage Agreement. In addition, the Trademark Guidelines permits the Employer “from time to time” to transport non-DHL shipments, but only if the Employer first obtains DHL’s express written authorization. There is no record evidence to show that the Employer has ever sought such authorization.

specifically told that they must be there at 6:30 or 7:00 a.m., the delivery demands established by DHL, and in turn made by Metro on the drivers, require that the vast majority of the package drivers begin their day when the freight begins to move down the conveyor belt.

Each package driver's route is set forth in his IC Agreement. Apparently, the drivers who came from H.B. Anderson kept the routes that they drove previously (some with minor changes). New drivers are offered the route that is available. The record established that Metro has modified drivers' routes. For example, driver Karen Snedeker was hired as an overflow courier and was also initially assigned a portion of a route (Suisun Old Town). Then, about six weeks later, Manager Selvin informed Snedeker that she no longer had the Suisun Old Town route and that she would instead do overflow work plus a portion of Oliver Road. As another example, when one driver's route became too much, Metro took a portion of that route (Leisure Town and Leisure Town Road) and assigned it to driver Adita May and it took another portion (Oliver Road) and assigned it to Lamont Norman. Similarly, difficulties with a route that included Vacaville and Winters resulted in the route being split between two drivers.

With regard to Saturdays, the package drivers generally volunteer for this work, but they have been informed that if there are insufficient volunteers, Saturday work will be assigned. Drivers are compensated separately for Saturday work in an amount that generally correlates to the geographic route that they perform.

Finally, when a route becomes available because a driver has left, Metro first offers the route to the existing drivers. According to Ingram, she does this to give existing drivers an

opportunity to obtain multiple routes and hire their own driver to cover the additional route. As of the time of the hearing, no driver operated more than one route.¹²

5. Vacations, Time Off and Replacement Arrangements

The Employer does not provide the drivers with any holidays, paid vacation, sick leave or any other fringe benefits. There is very little record evidence regarding vacation, time off and replacement arrangements.¹³ Initially it appears that package drivers were encouraged to find someone to cover their route if they were going to miss a day of driving for Metro and that if they were unable to, they would contact Manager Selvin who would either have an overflow driver (Snedeker) cover the route or would contact an outside courier company to cover the route. It is not clear whether the driver was charged any amount for the use of a courier company. Up until a month to two weeks prior to the hearing, it does not appear that a driver was charged if Snedeker covered his route. About a month to two weeks before the hearing, Manager Selvin told drivers that he could no longer call a courier company to cover a day for them and that if the driver could not find a replacement, the driver could contact Snedeker, arrange for Snedeker to cover the route, and the driver would have to negotiate Snedeker's compensation with her. Snedeker confirmed that she had occasionally covered routes for some drivers, but until about two weeks prior to the hearing, she had not collected any compensation from those drivers.

I give little weight to the fact that when Metro began its DHL operation at the Fairfield facility, Metro's first manager, Abdul Rasheed, took three routes – one for himself and two for drivers that he "hired." Rasheed has worked for Ingram since about 2003 in the San Francisco Bay area making deliveries and pickups for Metro's banking customers. Rasheed came to the Fairfield facility for Metro before Metro officially took over the DHL work from Anderson. Rasheed and his two drivers were at the Fairfield facility for only one month before all three returned to their Metro work in the Bay area.

A replacement driver is different than an overflow driver. A replacement performs a driver's entire route for a day or more. An overflow driver, on the other hand, delivers packages that will not fit on the driver's van on a particular day.

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There is no evidence that any of the drivers has hired a person from outside Metro to cover their route.

6. Adherence to Employer Policies. Metro does not maintain an employee handbook or list of employee work rules. On the other hand, the record clearly establishes that Metro has expectations of the drivers regarding their work and that Metro takes actions to ensure that the drivers meet those expectations. The expectations include: that the drivers routinely arrive in time to pick up freight at 7:00 a.m.; that the drivers rotate responsibility for throwing freight; that drivers make their deliveries and pickups by specified times; that the drivers' vans be kept clean and orderly; that drivers wear a DHL uniform; that drivers maintain certain DHL supplies in their van; and, that all packages be scanned. Metro has ensured that these expectations are met by suspending a driver for one day for failing to scan a package before it was delivered, by issuing a written warning to a driver for missed pickups and terminating that driver when her performance did not improve, by directing drivers to throw freight, by auditing the drivers' vans, and by maintaining the right to impose monetary penalties on drivers who have service failures.

Finally, under DHL's Trademark Usage Guidelines, Metro has agreed to develop policies or procedures to govern conduct by drivers while they are wearing DHL uniforms. The Trademark Usage Guidelines go on to specify approximately nine categories of unacceptable behavior including: engaging in abusive or discourteous conduct or using inappropriate or discourteous language; any offensive or abusive conduct including fighting, provoking a fight, threatening or inflicting bodily harm; any solicitation of customers, visitors or members of the public; and, any distribution of literature other than DHL literature or materials authorized by DHL.

7. Sources of Package Drivers' Income. The record establishes that the package drivers' income consists mainly of their daily flat rate. In addition, some package drivers earn extra income from Metro by working on Saturdays, by working on the pm sort, or by earning a bonus for not having any service failures. Under the bonus program implemented by Metro in May 2005, the package drivers can earn an additional 5% to 10% of their weekly rate if they have no service failures that week. CEO Ingram announced the plan at a driver meeting and adjusted it slightly based upon driver feedback. Metro did not negotiate individual bonus plans with drivers. Metro proposed the bonus plan in order to discourage service failures because if Metro attains a 99% percent service success ratio, then DHL will pay a bonus to Metro.

The IC Agreement acknowledges that the package drivers “may render services for competitors from time to time” but it specifically prohibits drivers from providing services for or approaching customers or clients of Metro with the intent of providing service to Metro’s clients. Metro introduced evidence showing that an unspecified number of drivers have between 30 minutes and 2.5 hours of “down time” each day between their morning deliveries and their afternoon pickups.¹⁴ The record, however, does not establish how many drivers have downtime each day or how much downtime each specific driver has. In addition, Ingram testified that the drivers must be available to Metro via their respective scanner and cell phone at all times between 7 a.m. and 4:30 p.m., including their “down time.”

There is no evidence that the drivers solicit additional business for DHL. Even if they did bring in additional DHL customers, this would not increase their compensation because they are paid a flat rate for their route – it does not matter how many packages they pickup or deliver.

¹⁴ This contention is supported by the testimony of package driver Karmen Thompson who regularly has 2.5 hours of downtime.

Drivers do not determine the price to be charged for pickup or delivery services, they do not determine what pickup and delivery services are offered to DHL's customers, nor do they take orders for pickups or deliveries, and they do not collect payments from DHL customers.

There is no evidence that the drivers make deliveries or pickups for any company other than Metro. In addition, the Cartage Agreement between Metro and DHL specifically prohibits the use of DHL-painted vans to make deliveries for a company other than DHL and prohibits the drivers from wearing the DHL uniforms while performing any work other than DHL deliveries.¹⁵ There is no evidence that any of the package drivers own or operate more than one van. There is no evidence that any of the package drivers has more than one route with Metro. Moreover, there is no evidence that the package drivers hire helpers or drivers from outside Metro to work for them. In sum, there is no evidence that the drivers receive substantial income from any source other than Metro.¹⁶

8. Training, Prior Experience, and Skill. The record reflects that little experience is required to be a delivery driver. Metro uses one of the experienced drivers to provide minimal training including how to use the scanner and how to fill out required paperwork. The package drivers are not required to have a commercial driver's license; a regular driver's license is all that is required to drive the cargo vans used by Metro.

9. Business Status of Drivers. Based on the record evidence, about half of the package drivers have fictitious business names. The Employer also introduced W-9 Request for Taxpayer

While Paragraph 4.7 of DHL's Trademark Guidelines permits Metro to transport non-DHL shipments from time to time, Metro must request written authorization from DHL to do so. There is no evidence that Metro has ever requested such authorization from DHL.

I give little weight to Manager Selvin's testimony that about a week before the hearing in this matter he began marketing his newly formed delivery company to make deliveries for pharmacies.

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Identification Number and Certification forms that were completed by ten of the drivers about two weeks prior to the hearing. No evidence was introduced that the drivers operate as business entities for tax and insurance purposes, that they deduct business expenses such as fuel, repairs, and lease payments from their taxes, or that they maintain separate bank accounts for their "business."

10. Personnel Files & Evaluations. There is no evidence that Metro maintains personnel files for the drivers, though CEO Ingram testified that Metro does keep internal records to track driver performance (for example, vehicle incidents, last minute calls saying that a driver will not be in, etc.) In addition, Metro keeps track of each driver's service failures. Finally, during the month or so prior to the hearing, Metro sent each package driver a letter signed by Ingram stating whether or not the driver was meeting Metro's standards in a satisfactory manner.

B. Analysis of the Status of the Package Drivers

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of an independent contractor." The Board determines whether an individual is an employee or an independent contractor by applying the common law agency test. *Argix Direct, Inc.*, 343 NLRB No. 108, slip op at 4 (December 16, 2004); *Roadway Package System, Inc.*, 326 NLRB 842, 849-850 (1998). See also, *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998). In *Roadway*, the Board rejected the argument that the predominant factor in this analysis is whether an employer has a "right to control" the manner and means of the work performed by the individual whose status is at issue. The Board cautioned that the right to control factors listed in the *Restatement (Second) of Agency* are not exclusive or exhaustive and, in applying the common-law agency test, it will consider "all the incidents of the individual's

relationship to the employing entity." *Roadway, supra* at 850; see also, *Dial-A-Mattress, supra* at 892.

The Board recently reaffirmed the analysis used in *Roadway* and *Dial-A-Mattress*. *St. Joseph News-Press*, 345 NLRB No. 31 (August 27, 2005), slip op. at 5.

As summarized by the administrative law judge in *Pan American Grain Co., Inc.*, 343 NLRB No. 47 (October 26, 2004), slip op. at 14-15, with regard to determinations involving employee versus independent contractor status:

Among the many factors that the Board has considered in making this determination in the cases of truck drivers/owners are whether the individuals: perform functions that are an essential part of the company's normal operations; receive training from the company; do business in the company's name with assistance and guidance from it; are prevented from engaging in outside business; provide services under the company's substantial control; have substantial proprietary interests beyond their investment in their trucks; lack significant entrepreneurial opportunity for gain or loss; leave their vehicles overnight with the company; are subject to discipline by the company, *Id.* at 851-852; have control and responsibility for their own employees; select and acquire their vehicles; are responsible for the financing, inspection, or maintenance of the vehicles without involvement by the company; are guaranteed minimum compensation by the company; are required by the company to provide delivery services each scheduled workday, *Dial-A-Mattress Operating Corp.*, 326 NLRB at 891-892; make their own arrangements for the parking and storage of the trucks when not in use; are free to decide whether to make their trucks available to the company on a particular day, *Portage Transfer Co.*, 204 NLRB 787, 787-789 (1973); receive direction from the company regarding the route to be used to a delivery point; are issued identification cards by the company; *National Freight, Inc.*, 146 NLRB 144, 146 (1964); operate trucks bearing the company's name; control the means by which he or she achieves the company's ends; *Deaton Truck Lines, Inc.*, 143 NLRB 1372, 1376-1378 (1963), *affd.* 337 F.2d 697 (5th Cir. 1964), *cert. denied* 381 U.S. 903 (1965); and have social security or other taxes withheld from their paychecks by the company; *Bowman Transportation, Inc.*, 142 NLRB 1093, 1096 (1963).

Finally, the burden is on the party asserting independent contractor status to show that the individuals in question are independent contractors. *Argix Direct, Inc., supra*; *BKN, Inc.*, 333 NLRB 143, 144 (2001).

Applying these factors to the instant case, I find that Metro's package drivers are employees within the meaning of Section 2(3) of the Act and not independent contractors. Although, as in most cases involving independent contractors, there is some evidence that supports a contrary conclusion, I find that the balance in this case weighs heavily in favor of a finding of employee status.

Thus, it is plain that the drivers perform functions that are an essential or "core" part of Metro's normal operations. See *Roadway Express, supra*; *Slay Transportation Company, Inc.*, 331 NLRB 1292 (2000). Metro's business is to deliver and pickup packages for DHL under an exclusive contract with DHL for that geographic area. Metro has no other business at the Fairfield facility. Without the package drivers, Metro would be unable to perform its basic business function. In sum, unlike the situations in *Pan American Grain Co., Inc.*, and *Dial-AMattress*, where the employers were engaged in businesses involving the manufacture, processing and sale of a product, here Metro's sole business is the work of the drivers, which is making pickups and deliveries for DHL. In this regard, this case is similar to *Roadway Express*, in which the drivers at issue were found to be employees rather than independent contractors, based in part on a finding that they performed an essential part of the company's business, which was delivering small packages. See also *Slay Transportation*, 331 NLRB at 1294.

The record reflects that the package drivers do not need any particular training or experience prior to working for Metro. Metro provides brief on-the-job training to teach new drivers their route, how to use a scanner and how to fill out paperwork. In addition, the package drivers are not required to have a special drivers' license of any kind. In this regard, the instant case is quite similar to *Roadway*, 326 NLRB at 851, where the drivers were not required to have any experience and gained assistance from Roadway's personnel in orienting them to the job. In

sum, there is no evidence that the package drivers are required to possess a level of specialized skill or that the type of work performed by them is normally performed by a specialist.

Further, the record shows that the package drivers must drive a certain model and make of vehicle and that the vehicle must be painted to DHL's specifications. In addition, the Cartage Agreement between Metro and DHL requires that the vans have the words "Operated By" and Metro's name on the sides. This evidence is similar to the situation in *Roadway*, where drivers were required to do business in the name of the employer and operated vehicles carrying the employer's logo. See also *Slay, supra*. This factor also serves to distinguish the instant case from *Pan American*, where the drivers were found to be independent contractors, based in part on a finding that their vehicles did not carry the employer's logo.

The evidence establishes that the package drivers in the instant case exercise no entrepreneurial control. Thus, Metro pays the drivers a flat daily rate and there is no evidence that the drivers make deliveries or drive for anyone other than Metro. There is no evidence that the package drivers utilize multiple vans or cover multiple routes. The package drivers almost always perform the work themselves and they do not have their own employees. See also *Slay, supra*. These factors serve to distinguish this case from *Argix Direct, Inc.*, *Dial-A-Mattress Operating Corp.* and *Pan American*, where the drivers found to be independent contractors owned multiple vehicles and regularly hired helpers and other drivers to perform their work and the drivers were not guaranteed an income. This case is also distinguishable from the facts of *St. Joseph News-Press* where the Board noted that the carriers were permitted to deliver other product, including competing newspapers, while driving for the respondent newspaper and where the carriers could solicit new customers, thereby increasing their compensation. In the instant case, except in limited circumstances where it has obtained prior authorization from

DHL, Metro is prohibited from permitting the vans to be used for anything other than the delivery of DHL packages and there is no evidence that the package drivers act contrary to this prohibition. There is also no monetary or other incentive for the drivers to solicit new DHL customers. Indeed, the express prohibition contained in the Cartage Agreement between Metro and DHL makes the instant case an even stronger fact pattern for a finding of employee status than that presented in *Roadway*, where the drivers at issue had a contractual right to use their trucks for outside business activity but were hampered from doing so by practical constraints created by their employer.

With further regard to the drivers' investment and entrepreneurial opportunity, while I recognize that many of the drivers have obtained fictitious business names and that Metro does not make tax and social security deductions for them, I do not find these factors to be controlling or to establish evidence of significant entrepreneurial opportunity under the circumstances presented in this case. As the Seventh Circuit noted in *J. Huizinga Cartage Co., Inc. v NLRB*, 941 F.2d 616, 620 (7th Cir 1991) enforcing 298 NLRB 965 (1990), if independent contractor status could be conferred merely through the absence of payroll deductions, "there would be few employees falling under the protection of the Act." Given the substantial control Metro exercises over the package drivers as described herein, the Board's observation in *Standard Oil Co.*, 230 NLRB 967, 972 (1977), is equally applicable here: "[I]t is clear that, unlike the genuinely independent businessman, the drivers' earnings do not depend largely on their ability to exercise good business judgment, to follow sound business practices, and to be able to take financial risks in order to increase their profits." See also *Roadway*, 326 NLRB at 852. Thus, the evidence discloses that Metro's package drivers have no substantial proprietary interest in Metro's business. Further, the package drivers' incomes are derived virtually 100% from the

work they perform for Metro. Metro controls the drivers' pay rates and provides drivers with a certain level of job and income security. Thus, like the zone core settlement structure in *Roadway*, Metro's system minimizes the entrepreneurial risks faced by the drivers. This is further exemplified by the fact that, when the price of gas has gone up and/or drivers have been able to document that they are experiencing higher mileage on their routes, Metro has agreed to increase the flat rate that it pays to the package drivers.

Overall, it appears that the package drivers' individual entrepreneurial opportunities are limited by the provisions contained in their IC Agreements and by the practical limitations presented by working as a DHL driver for Metro.

Further, the record establishes that Metro exercises a great degree of control over the drivers' work assignments, work schedules, the tools for carrying out the assignments and dress and grooming requirements.

With regard to work assignments, the package drivers have no say in which route they drive. Though many of the drivers continued driving the same route that they drove for the previous contractor, H.B. Anderson, new drivers are assigned to the route that is available.¹⁷ There is no evidence that drivers bid on new routes or can change their existing routes. Metro, on the other hand, has unilaterally modified existing routes. I find that Metro's contention that the drivers are independent contractors because it does not direct the order of the drivers' deliveries or how to load their trucks to be illusory. Given the schedule deadline imposed by DHL and by the IC Agreements, the drivers have little room to vary from the delivery order and loading techniques that are the most efficient.

¹⁷ Metro first offers available routes to existing drivers, though there is no evidence that existing drivers have bid on those routes.

Also with regard to work assignments, Metro has made it clear that if it runs out of volunteers for Saturday work, it will make such work mandatory. Metro ensures that drivers take turns throwing freight. In addition, Metro admits that drivers cannot refuse to make a delivery or a pickup.

With regard to work schedules, the record evidence establishes that drivers are expected to be at the Fairfield facility at 7:00 a.m., when the conveyor belt starts running. While a driver may be a few minutes late, it is clear from the client service requirements that a driver cannot be consistently or grossly late.

With regard to Metro's control of the tools used by the drivers, Metro requires that the drivers use certain models and makes of vehicle and that they be painted with DHL's colors and logo. Under the Cartage Agreement between DHL and Metro, once the van meets those specifications, the driver no longer may use it for any other business.¹⁸ In addition, Metro requires that the drivers carry certain DHL supplies in their vans at all times.¹⁹ Thus, Metro imposes control over the appearance and use of the drivers' vans. In contrast, the drivers in *St. Joseph News-Press*, *Dial-A-Mattress*, and *Argix*, did not have to meet any requirements as to the make, model, color or design of their vehicles. Moreover, because many of the drivers at issue rent their vans from Metro, Metro retains control in another way. Namely, Metro has created a system, similar to that created in *Roadway*, which makes "the necessary, custom vehicles readily available to prospective drivers, and enables drivers who want to end their relationship with it to

¹⁸ The only exception appears to be the vehicles used by the two "overflow" drivers. While the overflow drivers need not use a van with the DHL logo, Ingram testified that the overflow position is used to introduce drivers to Metro and its business and that the overflow drivers usually become package drivers with a regular route. At that point, they are required to drive a van meeting DHL's requirements.

¹⁹ There is no evidence that the drivers have to purchase these supplies.

easily transfer their vehicles to incoming drivers.” *Roadway*, 326 NLRB at 852. In addition, the drivers of the leased vans are not permitted to take their vans home at the end of the day because it would increase Metro’s costs.

Finally, I note that the rental fee charged by Metro to the drivers covers maintenance costs and registration fees. Metro also supplies, and requires the use of, DHL uniforms, DHL scanners, and DHL supplies and provides drivers the use of the DHL facility. Thus, the instant case differs from *Argix* and *St. Joseph News-Press*, where the drivers were solely responsible for obtaining and maintaining their vehicles. The case also differs from *St. Joseph News-Press* and *Dial-A-Mattress*, where the drivers were not required to wear a uniform and were not required to be clean-shaven. This case is more like *Roadway*, where the employer provided the drivers with the scanners and uniforms needed to complete their route.

Another factor in determining whether an individual is an independent contractor is whether he is engaged in a distinct occupation or business. In *Argix*, the drivers clearly operated their own distinct businesses. Specifically, a majority of the drivers placed their own names, addresses and/or logos on their delivery vehicles. Similarly, in *Dial-A-Mattress*, many of the drivers maintained their own business certificates with the state, organized as corporations, maintained business checking accounts, had their own company uniforms, filed corporate tax returns, maintained workers’ compensation for their employees and had business tax identification numbers.

In this case, although many of the package drivers have fictitious business names and many requested a Taxpayer Identification Number two weeks prior to the hearing, there is no evidence that they actually engage in their own business. Thus, all of the drivers wear DHL uniforms and drive vans with DHL colors and logo. They work out of the DHL warehouse, use

scanners supplied by DHL and perform pickup and delivery services Monday through Saturday for DHL customers. There is no evidence that any of the drivers deliver packages for companies other than DHL, that the drivers own multiple vehicles, or that the drivers employ other individuals. As indicated above, I give little weight to Manager Selvin's testimony that a week prior to the hearing he began marketing a new business delivering for pharmacies during the midday.

The term of the IC Agreements also support the conclusion that the drivers are employees rather than independent contractors. Thus, each of the IC Agreements is for an open-ended, indefinite period.

Moreover, while the IC Agreements may provide that the parties intend to create an independent contractor relationship, and the tax and benefit systems are structured as such, this factor also has been present in numerous other cases in which the Board has found drivers to be employees and is clearly not a determinative factor. See e.g., *Time Auto Transportation*, 338 NLRB No. 75 (2003); *Corporate Express Delivery Systems*, 332 NLRB 1522, 1524 (2000), enf'd 292 F.3d 777 (D.C. Cir. 2002); *Slay*, 331 NLRB at 1293; *Roadway*, 326 NLRB at 848; *Elite Limousine Plus*, 324 NLRB 992, 994 (1997).

Upon careful consideration of all the evidence in light of the above factors, I find that Metro has failed to meet its burden of establishing that the package drivers are independent contractors and I conclude, instead, that they are employees as defined by the Act. In reaching this conclusion, I primarily rely on the following factors: the package drivers perform an essential part of Metro's operation; the lack of required prior experience or particular skill level of the package drivers; Metro's assistance to the drivers with regard to renting vans to them and providing them with DHL uniforms, scanners and supplies; the fact that the vans must be painted

in DHL colors and with DHL's logo; the fact that the vans must state that they are "Operated By" Metro; the fact that the package drivers are paid a flat rate and that there is no room for entrepreneurial opportunity; the fact that the drivers do not control their work schedules or their routes; the open-ended term of the IC Agreements; and the fact that 100% of the package drivers' income is derived from Metro.

In concluding that the package drivers are employees, I find that this case has many more factors in common with *Roadway*, as discussed above, than *Dial-A-Mattress*. Thus, I find, as the Board found in *Roadway Package System*, 326 NLRB at 851, that Metro's drivers do not operate independent businesses but, rather, perform functions that are an essential part of Metro's normal operations; they need not have prior training or experience, but receive assistance in this regard from Metro; they do business in Metro's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of Metro's business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. All of these factors weigh heavily in favor of my finding of employee status, as they did in the Board's finding of employee status in *Roadway*.

In contrast, the drivers in *Dial-A-Mattress* did not perform a core function of the employer's business and many of the drivers in *Dial-A-Mattress* owned multiple trucks and had their own employees. The drivers in the instant case, on the other hand, rent or own one truck, have no employees, and drive exclusively for Metro.

In addition, in reaching my decision that the package drivers in this case are employees, I have carefully considered the Board's decision in *Argix Direct, Inc.*, in which it found the drivers at issue to be independent contractors, and I find that *Argix* is distinguishable from the facts in

this case. Thus, in contrast to the instant case, in *Argix*, there were no restrictions on the drivers' use of their trucks for purposes other than delivering for the employer and, in fact, two drivers in *Argix* withheld services from the employer in order to drive for other companies one day each week. Such evidence contrasts with the instant case where the package drivers are forbidden from using their DHL-painted vans to deliver packages for another company and there is no evidence regarding their having performed work for companies other than Metro. Second, the drivers in *Argix* were allowed to own multiple trucks and hire drivers and helpers and they did so, whereas in the instant case, only one package driver, Abdul Rasheed, had multiple routes, and that arrangement only lasted for about four weeks.²⁰ Third, in *Argix*, the employer did not provide the drivers with any financial assistance in buying their trucks or paying their expenses, whereas in the instant case, Metro has arranged to rent trucks to many of the drivers. Fourth, in *Argix* the drivers' vehicles were not modified specifically to suit the needs of the employer's business, as has been done in this case. Given such distinctions, I do not find that *Argix* requires a finding that the package drivers are independent contractors in this case.

Finally, I find that this case is distinguishable from *St. Joseph News-Press*, in which the Board found newspaper delivery drivers to be independent contractors. The drivers in *St. Joseph News-Press* were not required to use specific vehicles and were not required to display the newspaper's logo on their vehicle. The drivers maintained their own vehicles and were not reimbursed for maintenance or operating costs. The drivers could use their vehicles for other

²⁰ I note that Rasheed began working for Metro in October 2003 in the San Francisco Bay area providing courier services to banks (an operation completely distinct from Metro's DHL operation). CEO Ingram then brought Rasheed in to help manage the training and takeover of the DHL operation at the Fairfield facility and to help deliver overflow packages. When it appeared that Metro would not have enough drivers to cover all of the DHL routes, Rasheed took a route and he brought two of his drivers from his banking business to cover two additional routes. After four weeks, Rasheed and his two drivers stopped driving routes for DHL.

purposes and they could deliver other products including competing newspapers while they were delivering the employer's product. The *St. Joseph News-Press* drivers did not wear uniforms, could refuse to deliver to customers, could solicit new customers and benefited economically from having new customers, could hire full-time substitutes and could hold contracts on multiple routes. The drivers had little daily contact with the management at the newspaper because they worked very different hours. Finally, the Board noted that the parties in *St. Joseph News-Press* intended to create an independent contractor relationship. Other than language in the IC Agreements in this case indicating that the parties intended to create an independent contractor relationship, none of the other *St. Joseph News-Press* factors exist.

In conclusion, considering the degree of control exercised by Metro and weighing all the factors discussed above, I find that the package drivers are employees under the Act.

Accordingly, I decline to dismiss the petition based on the contention that the package drivers are independent contractors, and I find that they are employees within the meaning of Section 2(3) of the Act.²¹

III. STATUS OF DRIVER DAVID DAVIS

A. Facts

Driver David Davis has operated his own company, Dave's Delivery Service, for more than eight years. His company has provided service under contracts with companies such as Lowe's Home Improvement, Sears, J.C. Penney's, Best Buy, and Harley Davidson. Davis bid on each of those jobs and negotiated his fee. Davis' company owns six or seven vehicles

²¹ Similarly, I find that Karen Snedeker, the "overflow courier," to be an employee rather than an independent contractor. At the time of the hearing, Snedeker had a regular route that took part of her day and then she would deliver overflow packages – those that could not fit in other drivers' vans. She also occasionally covers other package drivers' routes or parts of their routes. The circumstances of Snedeker's employment, her daily routine and her responsibilities are the same as the package drivers. Thus, I shall include her in the bargaining unit.

including; a 30-ft Freightliner with a lift-gate; a 14-ft Isuzu box truck; a 24-ft flatbed truck; two cargo vans; and a Suburban with a trailer. None of Davis' trucks bear DHL's logo. At the time of the hearing, Davis had contracts to provide freight service to companies including Golden Gate Truck Center through Excel Direct, Collie Mortuary, Boston Realtors and Metro. Dave's Delivery Service has a business license, a fictitious name statement, and its own banking accounts. Davis' company carries workers' compensation because at one time it employed about 15 drivers and he still regularly employs individuals from Labor Ready.

Davis began providing transportation service to Metro in early February 2005. His company contracted to provide bulk pickup service for three major DHL customers. Under his arrangement with Metro, Davis uses his company's 30-ft Freightliner on Monday, Tuesday and Wednesday to make bulk pickups from Advanced Graphics and Bio-rad in Benicia, beginning shortly after 1:30 p.m. As the pickups are loaded onto his truck, Davis uses a DHL scanner to scan the package or pallet (depending on the destination). Davis typically leaves Bio-rad between 3:15 and 3:45. He then stops at a drop box a short distance from Bio-rad where he drops his scanner and any international paperwork for his load. After stopping at the truck scales, Davis then proceeds to the Sacramento Airport. He must be at the Airport by 6:00 p.m. After the Advanced Graphics and Bio-rad freight is unloaded, his responsibilities to Metro are complete for the day. Davis might pickup freight from the Airport for one of his other customers or he might go home.

On Thursdays and Fridays, Davis goes to DHL's Fairfield facility at about 1:30 p.m. to get Metro's box truck and to load two DHL freight containers onto the truck. Davis estimates that he is at the Fairfield facility for about five minutes. Davis then does his pickups at Advanced Graphics and Bio-rad and drives back to the Fairfield facility, typically arriving

around 4:00 p.m. Davis backs his truck into the facility but he does not unload his freight on to the conveyor belt. He then downloads his scanner and returns the truck keys to the office.

In addition to his pickups from Advanced Graphics and Bio-rad, Davis also goes to Travis Air Force Base once a week to drop off and pickup freight. Davis testified that he usually uses Metro's box truck for this work and that he is delivering things like pallets of tires, or airplane engines, transmissions or hundreds of packages. Davis also drops some smaller packages at a central location at Travis.

Metro pays Davis a flat fee of \$250/day for his services. At the time Davis signed his IC Agreement, CEO Ingram told him that she would be willing to look at his fee after six months to see if it needed to be adjusted. When Ingram and Davis initially negotiated his IC Agreement, Davis informed Ingram that he would only contract with Metro for three days a week because anymore than that would not be in his best financial interest (especially based on gas prices). Ingram compromised and offered to have Davis use the Metro box truck (including fuel) for his work on Thursdays and Fridays.

Because he does bulk pickups, Davis regularly uses a forklift and a pallet jack to load pallets from the DHL customers onto his truck. Davis carries his own pallet jack. B. Analysis

While there are some indicia Dave Davis could be an employee (for instance, he performs an essential part of Metro's operations), on balance, I find that Davis is more akin to the drivers who were found to be independent contractors in *Argix*, supra, and *St. Joseph NewsPress*, supra. In that regard I note that Davis, in direct contrast to the package drivers, operates his own business performing transportation services for multiple clients including Metro. Davis' company owns six or seven vehicles and, at one point, employed up to 15 other drivers. While

most of Metro's package drivers appear to have "formed" another company²² simply to work for Metro or H.B. Anderson, Davis truly operates another company and his contractual arrangement with Metro realistically allows for entrepreneurial opportunities. In this regard, I rely on the following factors: that Davis' contractual commitment with Metro only requires about 2 ½ to 4 ½ hours of work performed in one block; that he has a business license and fictitious business name because he actually needed them for his business (not merely to get a job); his business has its own checking account; and, he carries workers' compensation. Unlike the package drivers, Davis contracts with Metro to provide limited service – bulk pickups for two customers and bulk pickups/deliveries for a third customer. Unlike the package drivers, Davis is not required to report to the Fairfield facility each day by a certain time; in fact, on Mondays, Tuesdays and Wednesdays, he does not go to the facility at all. Finally, Davis is not subject to the possibility of Saturday work. There is no evidence that Metro routinely sends Davis messages on his scanner during the day, that Davis must wear a DHL uniform, that Davis must carry DHL supplies or that Davis is subject to random audits. Unlike the package drivers, Davis must possess a specialized license to drive the 30-ft and 28-ft trucks that he operates. Unlike the package drivers, Davis most often drives a 30-ft truck with his own company's logo, rather than DHL's logo, on the side. Finally, Davis had meaningful input into structuring the relationship between Dave's Delivery Service and Metro, as reflected by Ingram's agreement to let Davis drive a Metro truck (fuel included) in response to Davis' concern that he did not think it was worth his while financially to work more than three days a week for Metro. In addition, Davis

²² The only evidence of package drivers forming their own companies is that some of them have acquired a fictitious business name and/or made a request for a Taxpayer Identification Number. While Manager Selvin appears to have been in the beginning stages of forming his own business at the time of the hearing, I give this little weight because Selvin is not a package driver and because the timing of his efforts suggests that they were made in order to bolster the Employer's position at hearing.

negotiated Metro up from an offer of \$220/day to \$250/day, and he refused to work on weekends. In these circumstances, I find Davis to be an independent contractor, and I will exclude him from the unit.

IV. STATUS OF THE PM SORTERS

A. Facts

Metro has contracted with ten individuals to perform the “pm sort” each night. As described above, this work involves taking packages off the conveyor belt in the evening, sorting them, and placing them in the appropriate airport containers. The ten individuals performing this work are a mix on Metro and DNM drivers who have signed separate IC Agreements with Metro covering this work. Metro pays each driver \$16/day to perform the pm sort. Ingram testified that she believes that this work takes about 30 to 60 minutes to complete. Driver Nick Gong testified that the pm sort takes from 60 to 90 minutes to complete.

The Petitioner seeks to include the individuals performing the pm sort in the bargaining unit.²³ Metro takes the position that the DNM drivers who contract to perform the pm sort for Metro should be excluded because the DNM drivers who perform the pm sort for Metro were not included in the Petitioner’s initial petition and because the sorters have no benefits, withholdings or timekeeping requirements.

B. Analysis

I find that the pm sorters are employees and not independent contractors. The sorters report to the Fairfield facility at the same time each day to perform their work. The work is integral to the Employer’s business and does not require specialized skills. The sorters do not

²³ The Petitioner put the Employer on notice at the hearing that it was taking the position that the pm sorters should be included in the unit.

have any proprietary interests in the equipment they use, they lack any entrepreneurial opportunity, and they have a permanent working arrangement with the Employer as long as their performance is satisfactory. The fact that the work takes from 30 to 90 minute to complete does not transform these individuals into independent contractors; especially where, as here, some of the individuals spend the rest of the day performing other tasks for the same Employer.²⁴

The next inquiry is whether the pm sorters share a community of interest with Metro's package drivers. The record shows that most pm sorters are Metro package drivers.²⁵ The pm sort is simply additional work that they perform for Metro. In fact, the package drivers perform exactly the same work in reverse in the morning when they pick freight off the conveyor belt -they work at the same conveyor belt, in the same facility, but in the pm, sort packages to go into airport containers. In these circumstances, where the pm sort work is highly integrated with the work of the package drivers, there is a high degree of interchange because most pm sorters also work as package drivers for Metro, the pm sorters and package drivers are subject to the same method of compensation (via their IC Agreements), and the work involves similar skills and training, I find that the pm sorters and package drivers share a sufficient community of interest to be included in the same unit. See *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

With regard to the four pm sorters who are employed as package drivers by DNM during the day, I note that regular, part-time employees are routinely included in a bargaining unit. See generally *Fleming Foods*, 313 NLRB 948 (1994); *Farmers Insurance Group*, 143 NLRB 240,

Because Gong actually performs bargaining unit work at the Employer's facility, one might reasonably infer that his estimate of the time involved is more accurate than Ingram's. If the lower end of Ingram's estimate were accurate, employees who did no other work for the Employer might not qualify as regular part-time employees, an issue that I address below.

.. At the time of the hearing, four of the pm sorters were DNM drivers – Brian Silva, Jerome Pope, James Saladen and Mike Navarac.

245 (1979). Employees who regularly averaged four or more hours of work per week during the quarter prior to the eligibility cutoff date have been regarded as having a sufficient community of interest to be included in a bargaining unit. See *S.S. Joachim and Anne Residence*, 314 NLRB 1191 (1994); *V.I.P. Movers*, 232 NLRB 14 (1977); *Allied Stores of Ohio*, 175 NLRB 966 (1969). The record establishes that in addition to the pm sort, Jerome Pope also regularly transports freight to the airport, such that he engages in the requisite amount of bargaining unit work to qualify as a regular part-time employee. In addition to the pm sort, Silva occasionally covers a Saturday route for the Employer, but the record is insufficient to show conclusively that he, Saladin or Navarac works a sufficient number of hours for the Employer so as to qualify as a regular part-time bargaining unit employee. I shall set forth in my Direction of Election the criteria that the Employer should utilize to determine whether or not to include them or similarly situated employees on the eligibility list.²⁶

V. STATUS OF THE AIRPORT DRIVERS

A. Facts

Under its contract with DHL, Metro is responsible for transporting some of the freight to and from the Sacramento airport for the Fairfield facility (packages for both Metro and DNM). Three trucks bring freight from Sacramento Airport to the Fairfield facility each day: one at about 3:00 a.m., a later 53-ft. truck, and one truck at about 8:15 a.m. The record reflects that Metro is responsible for the truck that arrives at about 8:15 a.m.²⁷ In the evening, three vehicles

²⁶ Any individual whom the Employer excludes from the voter eligibility list on the ground that he performed insufficient bargaining unit work during the qualifying period may, of course, nevertheless vote subject to challenge.

²⁷ The record does not reflect who is responsible for the two earlier deliveries from the Sacramento Airport.

take freight from the Fairfield facility to the Sacramento Airport: a 24-ft. truck at 4:30 p.m., a chase van at 4:45 p.m., and a 53-ft. truck at 5:10 p.m. Metro is responsible only for the two runs made at 4:30 and 4:45 p.m.²⁸ At the time of the hearing, Dave Tutt drove the truck arriving at 8:15 a.m. and the truck leaving at 4:30 p.m. and Jerome Pope drove the 4:45 p.m. chase van to the airport. Both Tutt and Pope are DHL-package drivers during the day for DNM and have signed IC Agreements with Metro for the airport runs. Under the IC Agreements, Metro pays Tutt and Pope a flat fee for airport runs. Tutt uses a 24-ft. truck owned by Metro to make his airport runs. For the 4:45 p.m. airport run, Pope uses the cargo van that he uses to make DHL deliveries for DNM during the day.

B. Analysis

Based on the record evidence, I find that the individuals who drive trucks to and from the airport for Metro are employees, rather than independent contractors. As with the pm sorters, the airport drivers are performing services that are integral to Metro's business, the work does not require specialized skills, and the work happens at the same time each day. Tutt uses a Metro-owned truck to make his two airport runs and, thus, does not have any proprietary interest in the equipment he uses. Pope uses the same cargo van that he uses to make DHL-deliveries during the day, but it is not clear from the record whether he owns this van. There is no evidence that Tutt and Pope use other drivers to complete their airport runs; rather, they have a permanent working arrangement with Metro as long as their performance is satisfactory. Nor is there any evidence that Tutt and Pope have any entrepreneurial opportunity; while they work as package drivers for DNM during the day, there is no evidence that either Tutt or Pope runs a business

²⁸Metro is not responsible for the truck that leaves at 5:10 p.m.

transporting freight to the airport for any other companies. I also take note that, as DHL-package drivers for DNM, Tutt and Pope must wear a DHL uniform and they apparently are still in uniform when they make their airport runs. In these circumstances, while there are some factors that indicate an independent contractor relationship (i.e., a lack of benefits and withholdings), I find, on balance, that the airport drivers are employees within the meaning of the Act.

I also find that the airport drivers share a sufficient community of interest with the package drivers to be included in the unit. The airport drivers transport packages for Metro on a regular route – just as the package drivers do. They work out of the same facility, have the same supervision, have the same skills and similar training as the package drivers and, just like the package drivers, are required to sign an IC Agreement that compensates them on a flat-rate basis. They share an overwhelming community of interest with the package drivers. It is clear that the fact that the individuals who performed the airport runs at the time of the hearing were DNM package drivers during the day does not detract from this community of interest. Again, they are more akin to regular, part-time employees whom the Board routinely includes within bargaining units. *Fleming Foods*, supra; *Farmers Insurance Group*, supra. In addition, the record established that both Tutt and Pope averaged a sufficient number of hours per week to be considered regular, part-time employees. See *S.S. Joachim and Anne Residence*, supra; *V.I.P. Movers*, supra; *Allied Stores of Ohio*, supra.²⁹

²⁹ There was some testimony on the very last day of the hearing that Tutt told Ingram that he no longer wanted to perform the airport runs. Tutt, however, was still performing this work when the record closed. If Tutt is no longer employed by the Employer at the time of the election, of course he would not be eligible to vote.

VI. STATUS OF MANAGER SELVIN³⁰

A. Facts

Maury Selvin signed an IC Agreement with Metro at the end of February 2005 to be an overflow driver and to supervise the driver check-in (when drivers return to the Fairfield facility in the evening, off-load their packages and download their scanners). After about six weeks, Selvin “moved up” to the position of manager. At that time, his flat daily rate went from \$144.05 to \$172.60. According to CEO Ingram, Selvin is an onsite lead person who acts a liaison among Metro, DHL and the drivers. His responsibilities are to make sure that the am and pm sorts run smoothly, to maintain records in the computer system, to reconcile drivers’ activities with DHL’s reports, to interact with the DHL station manager, and occasionally to deliver or pick up packages. Ingram testified that Selvin does not have the authority to hire, fire, or discipline drivers.

Each morning, after the freight has been pulled from the conveyor belt, Selvin goes up and down the belt to make sure that all packages have been claimed by a driver. Selvin then lets the drivers know that they are “clear to go,” meaning that he has not found any packages left behind. If he finds a package that a driver left behind, Selvin will determine whether it is a package that must be delivered that day or whether it is “deferred” freight that can wait until the next day. Drivers must take the packages to be delivered that day and they are encouraged to

³⁰ In its brief, the Employer notes that the Hearing Officer indicated during the hearing that whether or not Maury Selvin was a supervisor under the Act would not be part of the decision and need not be briefed. While the Hearing Officer did make that statement on the second day of hearing, on the third day of the hearing the Hearing Officer went on to point out that Selvin’s status needed to be addressed in the record (TR 593). In addition, at the very end of the hearing, the Hearing Officer clearly set forth the issues to be decided, including whether or not Selvin should be included in the unit. (TR 856). There is detailed evidence adduced by both parties regarding Selvin’s responsibilities and I find that the issue of his status as a Section 2(11) supervisor has been fully litigated.

take deferred freight. If the driver has not already left the facility, Selvin may take a leftover package to the driver for delivery or inquire about why the driver is not taking it that day. If the driver has already left the facility and the package must be delivered that day, Selvin calls the driver and tells him to return to the facility to pick up the package.

Selvin also randomly selects two drivers to audit each morning. As part of the audit, Selvin scans about 20 randomly selected packages to make sure that the driver scanned all of his packages and has downloaded his scanner prior to leaving. Occasionally, at DHL's request, Selvin audits every package in a driver's van. If an audit reveals that a driver has not properly scanned a package, Selvin researches the history of the package and gives all of the information to the DHL station manager, Scott Rivers.

After all of the drivers have left on their routes in the morning, Selvin meets with Rivers to answer Rivers' questions about why packages might have been left behind and to review the pick-up and delivery reports from the prior day. Those reports reflect service failures that Selvin later discusses with the responsible driver.

Selvin has an office in the Fairfield facility. On occasion, if a driver is not available, Selvin makes a delivery or a pickup; he does not make deliveries on a daily basis.

A majority of the time, CEO Ingram is not at the Fairfield facility. In addition to the operation at the Fairfield facility, Ingram has businesses in the States of Idaho (about 14 drivers), Washington (about 22 drivers), and in the San Francisco Bay area (about 25 drivers). During the four months from the time Selvin began working as a manager until the time of the hearing, he conducted one job interview. There is no evidence that Selvin made a recommendation based on the interview. Ingram subsequently interviewed the same person and hired him. Selvin also

issued one written warning during this time, but Ingram explained that Selvin did so in error because Metro does not have a disciplinary policy.

About two weeks prior to the hearing, a driver was suspended after Metro discovered that he did not have the requisite insurance. The decision to suspend that driver was made by someone who works with Ingram in Boise, Idaho, and was not made by Selvin. B. Analysis

Petitioner seeks to exclude Selvin as a supervisor under Section 2(11) of the Act. The term “supervisor” is defined in Section 2(11) of the Act as:

[A]ny individual having authority, in the interest of the Employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In order to support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set out in Section 2(11) of the Act. *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993); *International Center for Integrative Studies*, 297 NLRB 601 (1990). Further, the authority must be exercised with independent judgment on behalf of the employer and not in a routine, clerical or perfunctory manner. *Clark Machine Corp.*, 308 NLRB 555 (1992); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). In determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 347 (1981). Whether an individual is a supervisor is to be determined in light of the individual’s actual authority, responsibility, and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th

Cir. 1976). Thus, the Act requires “evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority.” *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). Finally, the burden of proving supervisory status is on the party who asserts that it exists. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *California Beverage Co.*, 283 NLRB 328 (1987); *Tucson Gas & Electric Company*, 241 NLRB 181 (1979).

In the instant case, the record does not support a finding that Selvin is a supervisor under Section 2(11) of the Act. The record evidence establishes that Selvin communicates directives from Ingram to the drivers and that he acts as a liaison among DHL, Ingram and the drivers. There is no evidence that Selvin possesses any of the primary indicia of supervisory authority. Though he once issued a written warning to a driver for service failures, CEO Ingram later corrected Selvin, explained that Metro does not have a disciplinary procedure in place, and reminded him that Metro instead relies on its agreement with drivers that they can be fined for service failures. Thereafter, Selvin merely reminded drivers that they had signed an agreement with Metro under which they were subject to such fines. The record also reflects that Ingram decided, without any recommendation from Selvin, to terminate the contracts of three drivers and to suspend two other drivers. Finally, with respect to Selvin’s daily audits, the record does not reflect that the audits have resulted in discipline or fines or that they have had any impact on the drivers’ compensation. Thus, there is no record evidence that Selvin possesses, or has exercised, any of the statutory indicia of supervisory status.

The fact that Ingram is often away from the Fairfield facility and, as a result, the ratio of supervisors to rank-and-file employees is high, is a background factor to consider in resolving supervisory status but is not itself a statutory indicia. *Ken-Crest Services*, 335 NLRB 777

(2001). In the absence of any pertinent indicium of supervisory status, I find that Selvin is not a statutory supervisor, and I will include him in the bargaining unit.

VI. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. Metro is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Union claims to represent certain employees of Metro.
4. A question affecting commerce exists concerning representation of certain employees of Metro within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The package drivers, overflow couriers, airport drivers and pm sorters are employees within the meaning of Section 2(3) of the Act.
6. Driver David Davis is an independent contractor and is not an employee within the meaning of Section 2(3) of the Act.
7. Manager Selvin is not a supervisor within the meaning of Section 2(11) of the Act and will be included in the bargaining unit.
8. The package drivers, overflow couriers, airport drivers, pm sorters and manager share a substantial community of interest, since they all work for Metro out of the same location, perform the same work, under the same supervision and management, and are under the same

pay rate system. Accordingly, the following employees of Metro constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time package car drivers, overflow couriers, airport drivers, pm sorters and the manager employed by Metro at its Fairfield, California facility; excluding office clericals, guards and supervisors within the meaning of the Act.

VII. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those full-time employees who were employed doing bargaining unit work during the payroll period ending immediately preceding the date of this Decision, and those regular part-time employees who were employed doing bargaining unit work for an average of at least four hours per week during the 13 weeks immediately preceding the above-noted payroll period, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which

commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL UNION No. 150.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB. Wyman-Gordan Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision three copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the Regional Office, 901 Market Street, Suite 400, San Francisco, California 94103, on or before May 11, 2006. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099-14th Street, NW, Washington, DC 20570-0001. This request must
be received by the Board in Washington by May 18, 2006.³¹ Dated at San Francisco,
California, this 4th day of May, 2006.

/s/ Joseph P. Norelli

Joseph P. Norelli, Regional Director National
Labor Relations Board, Region 20 901 Market
Street, Suite 400 San Francisco, CA 94103-
1735

H:r20/Decisions/RC18042DDE(final)

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party
³¹ wishes to file one of these documents electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board web site: www.nlr.gov.